Supreme Envy Sdn Bhd v Abul Rahim bin Sinon (suing and acting as personal representative and representing the estate of Sinon bin Karnen, the deceased) & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCVC)(W)-1697–10 OF 2015
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
25 OCTOBER 2016

Land Law — Transfer — Fraud — Owner of master title to huge land after receiving full purchase price for sale of portion thereof and granting buyer vacant possession transferred portion to third party when individual titles were issued — Whether sale and transfer to third party breach of trust, fraudulent and void ab initio — Whether third party bought property with knowledge of highly suspicious circumstances surrounding sale — Whether third party immediate purchaser and could not prove bona fide purchaser for value without notice — Whether third party's title defeasible — Whether son and beneficiary of original buyer (since deceased) of portion of land had locus standi to recover land even though letters of administration not been extracted — Whether special circumstances been shown entitling son to sue

Sinon bin Karnen ('the deceased') had bought from the second respondent ('R2') a plot of land ('the property') which was part of a larger area under a master title in R2's name. The deceased had paid the full purchase price and was given vacant possession to occupy the property. He constructed a house on the property and paid assessment to the local city council. R2 had all the while represented to the deceased that it was in the process of subdividing the master title into individual titles so that the property could be transferred to him. About 16 years after the deceased's death, the first respondent ('R1'), who was the deceased's son and beneficiary under his estate, on learning that individual titles had been issued under R2's name, promptly lodged a private caveat on the property to protect the interests of all beneficiaries under the estate. Whenever he visited R2's office he was told that the transfer of the property would be done in due course and that he would be duly informed. However, for a long while he failed to receive any feedback from R2. In April 2014, R1 received a letter from the appellant claiming that it was the owner of the property and demanded vacant possession and payment of rental in respect of same. A land search by R1 revealed that R2 had surreptitiously transferred the property to the appellant. R1 sued R2 and the appellant in the High Court for, inter alia, a declaration that he was the lawful and beneficial owner of the property; that R2's transfer of the property to the appellant was *void ab initio* and that the appellant had not acquired any good title. R1 sought an order of specific

performance for the property to be transferred to him, an injunction restraining the appellant from dealing with the property and damages. In its defence, the appellant alleged, inter alia, that it was a bona fide purchaser for value without notice and that it had acquired an indefeasible title to the property. It also submitted that R1 was guilty of inordinate delay and laches in claiming his rights. The appellant counterclaimed for, inter alia, vacant possession and an order that R1 demolish the buildings that had been erected on the property. At the trial, R2 failed to appear to tender any evidence on its behalf. The High Court ruled in R1's favour holding, inter alia, that even though R1 had not extracted letters of administration to the deceased's estate, he had shown special circumstances that entitled him to maintain the action against the appellant and R2; that R1 was not guilty of laches; that on the facts, the appellant was not a bona fide purchaser for value without notice; that R2 was a constructive trustee of the property and had committed breach of trust and fraud in transferring the property to the appellant. In the instant appeal against the High Court's decision, the appellant again questioned R1's locus standi qua administrator for failing to extract letters of administration to the deceased's estate.

Held, dismissing the appeal and counterclaim and affirming the High Court's decision:

(1) R1 had the locus standi to commence the action against the appellant and R2. The trial court was correct in finding that R1 had shown special circumstances that entitled him to maintain the action without obtaining the letters of administration as he had to act expeditiously to protect and preserve the estate of the deceased (see paras 12–14).

(2) There was no inordinate delay in the filing of the suit and the appellant's submission on the application of the equitable doctrine of laches was completely unmeritorious. R1 had taken prompt steps towards enforcing his rights and he did not sleep on his claim (see paras 16–17).

(3) The deceased had fully paid the purchase price for the property and R2 had given him vacant possession to enter and administer the property. There was acknowledgement and admission of this fact in exh P4 issued by R2. R2, therefore, held the property as a bare or constructive trustee and had no title to sell or transfer the property to the appellant. The sale was *void ab initio* and R2 had no title to pass. It could not give what it did not have. R2 had committed breach of trust and fraud by transferring the property to the appellant (see paras 19–20, 24 & 35–37).

(4) The appellant was an immediate purchaser and had failed to discharge the evidential burden of proof of showing it was a bona fide purchaser for value without notice by its failure to conduct a proper investigation on the highly suspicious transaction involving the said property which was

sold without vacant possession and was occupied by R1. The appellant's title was not indefeasible but one that could legally be set aside (see paras 26, 28 & 37).

[Bahasa Malaysia summary

Sinon bin Karnen ('si mati') telah membeli daripada responden kedua ('R2') sebidang tanah ('hartanah') yang mana adalah sebahagian kawasan besar di bawah hakmilik utama dalam nama R2. Si mati telah membayar harga penuh dan memberi milikan kosong untuk menduduki hartanah. Dia telah membina sebuah rumah di atas hartanah dan membayar taksiran kepada majlis perbandaran. R2 selama ini telah menyatakan kepada perayu bahawa ia di dalam proses membahagikan hakmilik utama kepada hakmilik individu supaya hartanah boleh dipindah milik kepadanya. Lebih kurang 16 tahun selepas kematian si mati, responden pertama ('R1'), yang merupakan anak lelaki si mati dan benefisiari di bawah estetnya, apabila mengetahui hakmilik individu telah dikeluarkan di bawah nama R2, dengan segera memasukkan kaveat persendirian ke atas hartanah untuk melindungi kepentingan kesemua benefisiari di bawah estet. Setiap kali dia melawat pejabat R2 dia telah diberitahu bahawa pindah milik hartanah akan dilakukan dalam masa terdekat dan dia akan dimaklumkan dengan sewajarnya. Walau bagaimanapun, setelah sekian lama dia gagal untuk menerima apa-apa maklum balas daripada R2. Satu carian tanah oleh R1 mendedahkan bahawa R2 telah diam-diam memindah milik hartanah kepada perayu. R1 menyaman R2 dan perayu dalam Mahkamah Tinggi untuk, antara lain, satu deklarasi bahawa dia adalah pemilik sah dan benefisial hartanah; bahawa pindah milik harta oleh R2 kepada perayu adalah tidak sah *ab initio* dan bahawa perayu tidak memperolehi apa-apa hakmilik baik. R1 memohon satu perintah pelaksanaan spesifik untuk hartanah dipindah milik kepadanya, satu injunksi untuk menyekat perayu daripada berurusan dengan hartanah dan ganti rugi. Dalam pembelaannya, perayu mendakwa, antara lain, bahawa ia adalah pembeli untuk nilai tanpa notis dan bahawa ia telah memperolehi hakmilik tak boleh sangkal atas hartanah. Ia juga dikemukakan bahawa R1 adalah bersalah akan kelewatan melampau dan *laches* dalam menuntut haknya. Perayu menuntut balas untuk, antara lain, milikan kosong dan perintah bahawa R1 meruntuhkan bangunan yang telah didirikan di atas hartanah. Sewaktu perbicaraan, R2 gagal untuk mengemukakan apa-apa keterangan pada pihaknya. Mahkamah Tinggi memutuskan berpihak kepada R1, antara lain, walaupun R1 tidak mengeluarkan surat kuasa mentadbir estet si mati, dia telah menunjukkan keadaan khas bahawa dia mempunyai hak untuk mengekalkan tindakan terhadap perayu dan R2; bahawa R1 tidak bersalah atas *laches*; bahawa atas fakta, perayu bukanlah pembeli suci hati untuk nilai tanpa notis; bahawa R2 adalah pemegang amanah konstruktif terhadap hartanah dan telah melakukan pecah amanah dan fraud dalam memindah milik hartanah kepada perayu. Dalam rayuan ini terhadap keputusan Mahkamah Tinggi, perayu sekali lagi

mempersoalkan locus standi R1 sebagai pentadbir untuk kegagalan mengeluarkan surat kuasa mentadbir estet terhadap estet si mati.

Diputuskan, menolak rayuan dan tuntutan balas dan mengesahkan keputusan Mahkamah Tinggi:

(1) R1 mempunyai locus standi untuk memulakan tindakan terhadap perayu dan R2. Mahkamah perbicaraan adalah betul dalam membuat dapatan bahawa R1 telah menunjukkan keadaan istimewa yang membuatkan dia mempunyai hak untuk mengekalkan tindakan tanpa mendapatkan surat kuasa mentadbir pusaka memandangkan dia perlu bertindak segera untuk melindungi dan memelihara estet si mati (lihat perenggan 12–14).

(2) Tiada kelewatan melampau dalam memfailkan guaman dan hujahan perayu terhadap permohonan ekuiti doktrin *laches* adalah sangat tidak bermerit. R1 telah mengambil langkah segera kepada menguatkuasakan haknya dan dia tidak tidur di atas tuntutannya (lihat perenggan 16–17).

(3) Si mati telah membayar sepenuhnya harga belian untuk hartanah dan R2 telah memberikannya milikan kosong untuk masuk dan mentadbir harta. Terdapat perakuan dan pengakuan fakta ini di dalam eksh P4 yang dikeluarkan oleh R2. R2, oleh itu, memutuskan harta sebagai *bare trust* atau amanah konstruktif dan tidak mempunyai hakmilik untuk menjual atau memindah milik harta kepada perayu. Jualan adalah tidak sah *ab initio* dan R2 tidak mempunyai hakmilik untuk diserahkan. Ia tidak boleh memberikan apa yang ia tiada. R2 melakukan pecah amanah dan fraud dengan memindah milik harta kepada perayu (lihat perenggan 19–20, 24 & 35–37).

(4) Perayu adalah pembeli terus dan gagal untuk melepaskan beban pembuktian keterangan yang menunjukkan ia adalah pembeli suci hati untuk nilai tanpa notis dengan kegagalannya untuk melakukan siasatan sewajarnya ke atas transaksi yang sangat mencurigakan yang melibatkan harta tersebut yang mana dijual tanpa milikan kosong dan diduduki oleh R1. Hakmilik perayu bukanlah tak boleh sangkal tetapi satu yang boleh dengan undang-undang diketepikan (lihat perenggan 26, 28 & 37).]

Notes

For cases on fraud, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 5680–5684.

Cases referred to

Al Rashidy bin Kassim & Ors v Rosman bin Roslan [2007] 4 MLJ 297; [2007] 3 CLJ 361, FC (refd)

Ang Hoi Yin v Sim Sie Hau [1969] 2 MLJ 3, HC (refd)

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567, CA (folld)

Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136; [2007] 4 CLJ 526, CA (folld)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)
Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd & Ors [2014] 11 MLJ 422, HC (refd)
M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294, SC (refd)
Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768, FC (refd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (refd)
State Tailor Sdn Bhd v Nallapan [2005] 2 MLJ 589, CA (refd)
Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)
Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal [2014] 1 MLJ 645; [2013] 9 CLJ 577, CA (refd)

Legislation referred to

National Land Code ss 340, 340(2)(b), (3)

Appeal from: Civil Suit No 23NCVC-25–06 of 2014 (High Court, Johor Bahru)

Wong Kim Fatt (Chang Tau Sian with him) (Henry Soong & Chang) for the appellant.
Mohd Fairuz bin Abdullah (Mohd Najid & Partners) for the respondents.

Idrus Harun JCA:

FACTS

[1] The first respondent was the lawful son of the late Sinon bin Karnen ('the deceased') and the beneficiary of the deceased's estate. He has brought this action as a personal representative and beneficiary of the deceased's estate. The deceased, circa 1968–1970, bought a plot of land known as Lot 71 measuring 596 sqmt ('the said property') which was part of a land measuring approximately 160 acres held under a master title known as Lot 4648 CT 17421 Mukim Plentong ('the master title') from the second respondent being the registered owner with the purchase price of RM2,274. It is an irrefutable fact that the deceased had settled the purchase price of the said property and subsequently was given vacant possession by the second respondent to occupy

and administer the said property based on form PTB/13 dated 22 February 1972 issued by the second respondent ('exh P4'). The deceased had also constructed a house on the said property in 1973 and paid the assessment bills to the Johor Bahru City Council ('the city council'). In fact, the said property was registered under the deceased's name at the city council and upon the death of the deceased, the name of the first respondent was registered as the owner of the said property ('exhs P5(a)–(r) and P9' being the assessment receipts issued under the name of the deceased and thereafter the first respondent).

[2] The first respondent, in his evidence, had maintained that the deceased and himself had, from time to time, met the second respondent to enquire about the individual title of the said property which needed to be transferred to the deceased but was told that the second respondent was still in the process of subdividing the master title into individual titles. The deceased died on 29 August 1989. In September 2005, the first respondent received information that the individual titles had been issued under the name of the second respondent. The first respondent subsequently entered a private caveat on the said property vide presentation No 29946 of 2005 on 13 September 2005 to protect the interest of the beneficiaries including himself in the said property ('exh P7').

[3] The first respondent went to the office of the second respondent several times and was told that the transfer would be effected and they would inform him by mail. However the first respondent did not receive any feedback from the second respondent. The subsequent events took an ominous and unfortunate turn for the first respondent when he received a letter dated 28 April 2014 from the appellant who claimed to be the owner of the said property demanding vacant possession and payment of rental in respect of the said property ('exh D15'). Attached to the letter was the appellant's solicitor's letter dated 29 April 2013 which made a similar demand from the first respondent. The first respondent then made a land search on 12 May 2014 and found out that the said property was transferred by the second respondent to the appellant vide presentation No 30274 of 2013 on 22 April 2013 ('exh P7'). It is the first respondent's case that neither he nor other beneficiaries had agreed to sell the said property nor received any notice from the second respondent of the intention to sell the said property to the appellant. The first respondent in his evidence alleged that the second respondent had committed fraud by allowing the said property to be transferred to the appellant without his knowledge. A police report was lodged by the first respondent on 12 May 2014 ('exh P8').

THE CLAIM

[4] The first respondent, inter alia, seeks a declaration that he is the lawful beneficial owner of the said property, the transfer of the said property by the second respondent to the appellant was void *ab initio* and that the appellant's title on the said property was not indefeasible. He is also seeking an order of specific performance for the said property to be transferred to him, an injunction to restrain the appellant from selling, transferring, charge or otherwise dealing with the said property, damages and interest.

THE DEFENCE

[5] The appellant asserts that the property was bought from the second respondent based on the sale and purchase agreement dated 22 January 2013 for RM40,000 and subsequently the transfer was registered on 22 April 2013 and claims that the title is indefeasible and cannot be challenged. They also allege that the first respondent had built a house without their knowledge or consent, and that the first respondent had no right to pay the assessment rate. The appellant further asserts that they were a bona fide purchaser for value without notice based on searches conducted on the said property by their solicitors during the transfer of the said property. They deny having any knowledge that the said property belonged to the first respondent and plead that the first respondent was guilty of inordinate delay and laches in claiming his right. The defence of limitation is also pleaded by the appellant.

[6] Given the nature of the defence, the appellant consequently counterclaims for the following reliefs:

(a) an order for the first respondent to demolish the building on the said property;

(b) a declaration that the construction of the building on the said property was a trespass and illegal;

(c) an order of vacant possession of the said property be given to him; and

(d) damages to the appellant to be assessed.

THE HIGH COURT'S DECISION

[7] The learned judge found that the deceased, having bought the said property, had paid the purchase price in full whereupon he built a house and lived thereat. According to the learned judge, there were special circumstances from the facts adduced to entitle the first respondent to commence this action against the second respondent and the appellant grounded on the allegation of

fraud in the absence of a letter of administration. His Lordship also held that the first respondent was not guilty of laches. In dealing with the issue of indefeasibility of title under s 340 of the National Land Code, the learned judge found that the appellant was an immediate buyer and accordingly the defence of bona fide purchaser for value without notice under the said section was not available to the appellant. It is worthy of note that the second respondent did not attend the trial and no witness was called to testify on their behalf. Thus, on the issue of fraud, the second respondent having been absent, it was held that they had transferred the said property to the appellant fraudulently.

[8] With respect to the allegation of fraud as against the appellant however, the learned judge found no such evidence before the court. But, as regard the appellant's defence that they are a bona fide purchaser for value without notice, the learned judge held that the onus is on the appellant to prove that defence. From the evidence adduced, the learned judge held that the first respondent had established that the relationship between the second respondent and the deceased was that of a constructive trustee and beneficiary since full purchase price had been paid and vacant possession of the said property had been surrendered. The deceased had acquired beneficial interest over the said property and thus when the second respondent sold the said property to the appellant, they had committed a breach of trust. The learned judge held that the appellant had not done enough to avail himself of the defence of bona fide purchaser for value without notice. Since the appellant knew that there were occupants occupying the said property, the appellant ought to have conducted a land search. Although the appellant claimed that they had carried out the land search before the execution of the sale and purchase agreement, the learned judge was doubtful whether the search was in fact conducted since the appellant did not produce any exhibit to prove such claim. For these reasons, the learned judge held that the appellant failed to satisfy the court that the appellant was a bona fide purchaser for value without notice.

THE GROUNDS OF APPEAL

[9] The gravamen of the appellant's complaints in this appeal are fully set out in the memorandum of appeal. The grounds upon which the appellant principally relies, as it is clear to us, are that the learned judge had erred in deciding that the first respondent's claim was based on the breach of constructive trust and that the appellant bore the burden to prove that they were the bona fide purchaser for value without notice. Another ground raised by the appellant concerns the alleged failure on the part of the learned judge to consider that s 340 of the National Land Code protects the rights of the appellant as the registered proprietor of the said property.

A LOCUS STANDI

[10] We would, to begin with, emphasise that this issue is not raised in the memorandum of appeal neither is it pleaded in the appellant's defence. However, since this is a point of law, the underlying principle is that the appellant ought to be allowed to raise it at anytime and since it has been raised in their submission, it behoves this court to deal with this issue. The learned judge had in fact directed his mind on this issue before making the decision. Relying on the case of *Ang Hoi Yin v Sim Sie Hau* [1969] 2 MLJ 3, the learned judge correctly stated the general rule that a person who sued as an administrator but had not extracted letters of administration at the commencement of an action had no power to sue qua administrator. The rule also applies to a person being sued as administrator. The writ must be regarded as a nullity from the beginning and be set aside. However, the general rule has been qualified by the Federal Court's decision of *Al Rashidy bin Kassim & Ors v Rosman bin Roslan* [2007] 4 MLJ 297; [2007] 3 CLJ 361, which clearly established that if there were special circumstances, the administrator would have locus to proceed with the legal proceedings notwithstanding an absence of any grant of probate or letter of administration.

[11] The learned judge then proceeded to consider whether there were special circumstances in this action and made the following findings of fact:

(a) the deceased bought the said property from the second respondent and had paid the purchase price in full. He then built a house and lived thereat;

(b) the first respondent enquired from the second respondent and was told that they were in the process of subdividing the master title into individual titles and they would keep the first respondent informed about the development of the subdivision;

(c) the first respondent entered a private caveat on 13 September 2005 when he received information that the individual title known as HS(D) 302292 Lot 29661 Mukim Plentong Daerah Johor Bahru for the said property was issued and registered in the name of the second respondent. The first respondent then went to see the second respondent and was promised that they would do the transfer of title; and

(d) the first respondent was not informed of the status of the said property by the second respondent until the appellant served a notice for vacant possession on him on 29 April 2013. He then filed an action against the second respondent and the appellant in June 2014.

Consequently, the learned judge found that there were special circumstances from the facts adduced to entitle them to commence this action against the

second respondent and the appellant on the ground of fraud in the absence of a letter of administration. Since the second respondent had promised the first respondent that they would do the transfer of the title and keep him informed of the status of the said property, there was no necessity for the first respondent to apply for a letter of administration with a view to sue until he discovered that the second respondent had breached the contract and the trust when they sold the said property to the appellant and the appellant served the notice of vacant possession on the respondent on 29 April 2013. The first respondent then filed this action against the second respondent and the appellant in order to protect and preserve the estate of the deceased.

[12] We have absolutely no reason to disagree with these findings of fact as it is supported by evidence. We would necessarily add that the land search ('exh P7') conducted by the first respondent on 12 May 2014 upon receiving the notice for vacant possession revealed that the appellant was registered as the new land owner. The events that had thus transpired would entail a prompt and expeditious action rather than to wait and apply for a letter of administration in the Singapore High Court as suggested by learned counsel for the appellant during cross-examination of PW1 though the said property is in Malaysia, or go through the lengthy process of applying to become the administrator in Malaysia.

[13] Another reason is that, it would not be possible for the first respondent to be appointed as the lawful administrator and apply for distribution of the said property because the said property has yet to be registered under the deceased's name. If the first respondent had waited for the above process to take place, there are real risks that the said property would be disposed by the appellant to another party. If that is to happen the first respondent would most probably lose his right to claim for the said property as the property may arguably be transferred to a subsequent bona fide purchaser.

[14] The above considerations taken into account by the learned judge are without doubt correct as it is now obvious that the first respondent had shown special circumstances to file an action without obtaining a letter of administration as the first respondent had to protect and preserve the estate of the deceased. We are therefore satisfied that the first respondent has the locus standi to commence this action against the appellant and the second respondent.

LACHES

[15] The learned judge in arriving at his decision on this point said:

> The facts of the case show that the plaintiff had lodged a private caveat once he knew that the sub division of the land was approved to protect the interest of the

A beneficiaries. He was then waiting for the first defendant to do the necessary since he was told by the first defendant that they would keep him informed of the status of the subject property but never did so.

I am of the considered view that under such circumstances the plaintiff has done what he could by lodging a private caveat to protect the interest of the beneficiaries. He should not be faulted for not knowing that his private caveat had only a life span of six years. I therefore find that the plaintiff is not guilty of laches.

It is of some significance to observe that the first respondent had only received the notice demanding vacant possession of the said property from the appellant's solicitors in 2013 and from the appellant on 28 April 2014. The suit was promptly filed on 29 May 2014. We would say that there was no necessity to file a suit in 2005 when it was found that the master title was subdivided into individual titles. It is also unthinkable for the appellant to raise the equitable defence of laches contending that delay should commence from the date of the sub-division of the individual titles as the source of delay. This is due to the fact that, based on DW2's testimony, the appellant was only incorporated on 8 August 2012. The first respondent almost immediately filed the present suit upon receiving the appellant's notice dated 28 April 2014.

[16] Furthermore, the issue of laches raised by the appellant in particular, by claiming that the respondent had failed to explain why having entered a caveat upon the said property and allowing the caveat to lapse six years after without any action taken to enforce his alleged rights to the said property until this action was filed is again, without merit. The first respondent lodged the caveat in order to protect his beneficial interests in the said property. Such course of action was the logical thing for the first respondent to do upon discovering that the master title had been subdivided into individual titles. The first respondent, as the evidence has shown, did visit the second respondent's office several times thereafter but was told that the transfer would be effected and he would be notified. This evidence was not seriously challenged. Obviously, the first respondent had taken steps towards enforcing his rights and he did not sleep on his claim.

[17] We do not think that anything material turns upon the argument that the first respondent allowed the caveat to lapse without enforcing his rights to the said property. The failure to enforce such rights would certainly not negate or defeat those rights when the first respondent did not file the action during the period when the caveat was valid for it is clearly manifested in the evidence that the first respondent was pursuing the matter with the second respondent. In any event and to reiterate, the first respondent commenced the action soon after he received the appellant's notice dated 28 April 2014. He was certainly not in a deep slumber before he woke up to commence this action. The appellant's equitable defence of laches fails to bite and as such must be rejected. In the Federal Court's case of *Samuel Naik Siang Ting v Public Bank Bhd*

[2015] 6 MLJ 1; [2015] 8 CLJ 944 it was stated that in law, a caveat did not create any rights or interest but merely gave notice to the world of the presence of an interest belonging to someone other than the registered proprietor, as such, the failure on the part of a respondent to lodge a caveat timeously, did not in any way negate or defeat its equitable rights, title and interests in respect of the lots in question. In our judgment, there was no inordinate delay in filing this suit and we reject the appellant's submission on the application of the equitable doctrine of laches as being completely unmeritorious.

CONSTRUCTIVE TRUST

[18] On this issue, we begin by reproducing the relevant excerpts from the grounds of decision of the learned judge:

> From the facts adduced, I find that the plaintiff has established that the relationship between the first defendant and the deceased was that of a constructive trustee and beneficiary since full purchase has been paid, possession has been surrendered. Hence the deceased had acquired the beneficial interest over the subject property.
>
> When the first defendant sold the property to the second defendant it has committed a breach of trust. However equity will not assist the victim of a breach of trust to trace the trust property which has gone into the hand of a bona fide purchaser for value.

In the Federal Court case of *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 Gopal Sri Ram FCJ said:

> If a trustee or other fiduciary acquires a property in breach of trust or by means of other unconscionable conduct, he or she holds it on a constructive trust for the true beneficiary.

[19] The evidence gleaned from the appeal records shows that the deceased had made full payment for the purchase of the said property of which the vacant possession thereof had been given to the deceased and that the second respondent obtained individual title to the said property in 2005. In our judgment, the second respondent held the said property on trust from the outset in favour of the deceased even before the individual titles were issued. It was held by the Federal Court in *Takako Sakao* at p 767 (MLJ); pp 386–387 (CLJ):

> The appellant's claim — a proprietary and not merely monetary claim — against the first respondent was as a beneficiary under a constructive trust ...
>
> *A constructive trust is imposed by law irrespective of the intention of the parties*. It is imposed only in certain circumstances, such as where: (i) there is a specifically enforceable *contract for the sale of property (movable or immovable), the vendor holds the property on a constructive trust for the purchaser*; and (ii) a gift made as a donatio mortis causa fails, the intended beneficiary of the gift holds it in trust for the donor. What equity does in those circumstances is to fasten upon the conscience of the

holder of the property a trust in favour of another in respect of the whole or a part thereof. (Emphasis added.)

Thus, based on the totality of evidence and in particular exh P4 there was an acknowledgment and admission from the second respondent that Lot 71 was bought by the deceased and the second respondent had given possession of the said lot to the deceased. Exhibit P4 is *Borang* PTB/13 dated 22 February 1972 issued by second respondent and it states unequivocally as follows:

> Dengan gembiranya dimaklumkan iaitu lot tanah yang tersebut diatas yang tuan/puan beli dari kami telah siap diberi tanda oleh pihak juruukur kami. Dari itu dengan sukachitanya kami serahkan tanah yang tersebut kepada tuan/puan memasoki dan mentadbirkan tanah tersebut dari tarikh tuan/puan menandatangani borang yang disertakan.

[20] We need only say on this documentary exhibit that the contents thereof and the subsequent conduct of the second respondent in delivering vacant possession of the said property to the deceased have manifestly shown that the said property had been sold to the deceased with the payment of the purchase price made to the second respondent. The irrefutable evidence of the first respondent as per his witness' statement at questions 12 and 13 lends support to this contemporaneous documentary evidence. Obviously there was admission made by the second respondent through exh P4 to the fact that the said property had been bought by the deceased and the second respondent expressly stated that the said property is now given to the deceased to enter and administer. In addition to exh P4, there were other contemporaneous documents that established the sale and purchase transaction between the deceased and the second respondent and occupancy of the said property by the deceased. These are exhs P2, P3 and P5A–5R which are respectively the payment of deposit form, Form PTB/2A dated 22 November 1970 which contained the deceased's further agreement to make various other payments for the purpose of the purchase and payment of assessment rate to the local authority. The first respondent in his witness' statement at question 16 confirmed that his father, the deceased, had built two houses in 1973 and the family lived there. Again this evidence was never challenged by the appellant.

[21] It would therefore be manifestly unconscionable, in the face of the overwhelming evidence of the sale of the said property and occupancy of the same by the deceased, for the second respondent to assert their own beneficial interest in the said property and deny the beneficial interest of the deceased and the first respondent (*Takako Sakao*). The law regards the second respondent, who held the said property on constructive trust, as a constructive trustee in respect of the said property (*Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd & Ors* [2014] 11 MLJ 422).

[22] Under the circumstances, we have absolutely no hesitation to hold that the deceased and subsequently the first respondent as the beneficiary of the estate of the deceased, is entitled to the said property held by the second respondent under a constructive trust. With the overwhelming evidence, it is virtually impossible for this court to agree with the appellant that the deceased was a trespasser. The deceased clearly acquired the beneficial interest on the said property even before the appellant was incorporated in 2012, when the second respondent gave vacant possession of the said property to the deceased in 1972. Certainly the rights of the first respondent as the beneficiary of the estate of the deceased cannot be denied.

[23] In *Samuel Naik Siang Ting*, which is very relevant and has almost similar facts to the present case, Majlis Perbandaran Manjung ('MPM') was the registered proprietor of a piece of land ('the said land') which was subdivided into various lots. MPM appointed the developer to develop the said land. Subsequently between 2001–2002 MPM and the developer entered into various sales and purchase agreements with five different purchasers (earlier purchasers). The first respondent then granted the earlier purchasers loans to finance the purchase of the lots. At the time the sale and purchase agreements and loan agreements were executed, the individual titles for each lots had not been issued. In 2003, the temporary documents of title were issued in respect of the said land. Unknown to the first respondent bank, MPM and the developer had sold the lots to five new purchasers and executed various sale and purchase agreements with the new purchasers. The title to the said lots were then transferred to and registered in the name of the new purchasers. The Federal Court held:

> It is settled law that after receipt of the full purchase price and the surrender of the possession of the lands to the purchasers, the vendors of the land became bare trustee. It was thus clear that MPM, being the registered proprietor of the land after executing the sale and purchase agreements with the earlier purchasers and having received the full purchase price, was a bare trustee (that is, a person without beneficial interest in the property). In other words, MPM in the present case, was not permitted in law to sell or transfer the land to the new purchasers, including the appellant. Thus, the Court of Appeal was correct in its finding that the subsequent sale of the lots by MPM to the new purchasers (including the appellant) were void *ab initio,* as MPM did not have any legal or requisite capacity to enter into such agreements.

[24] In the present case there was acknowledgement made by the registered owner, namely the second respondent, through exh P4 issued by the second respondent to the deceased that the said property had been bought by the deceased and the second respondent expressly stated that the said property was given to the deceased to enter and administer. The evidence of the first respondent in respect of the purchase of the said property made by the deceased

was never challenged. The first respondent's evidence was in any event supported by various other contemporaneous documentary evidence in exhs P2, P3, P4 and P5. The second respondent was represented by a solicitor during the first respondent's case, however their only witness suddenly disappeared during the second respondent's case and could not be contacted. As a result the said solicitor had to discharge himself from further acting for the second respondent. There was therefore no rebuttal by the second respondent and there was no appeal filed by the second respondent against the decision of the learned judge. In the premises, we are in agreement with the learned judge that the second respondent held the said property on trust. The first defendant was not permitted in law to sell and transfer the said property to the appellant. The sale therefore was void *ab initio* as the second respondent clearly did not have any legal or requisite capacity to do so. We find that the issue under consideration is wholly devoid of any merit and must be rejected.

ISSUE OF BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE

[25] The appellant in the statement of defence as well as their submission has raised the defence that they were a bona fide purchaser without notice for valuable consideration. We pause to observe at this point that the learned judge found that the appellant was an immediate purchaser. The appellant, it is to be noted, treated the issue of whether the appellant was an immediate purchaser as a subsidiary point stating that the instant case is a unique case in the sense that the first respondent was never the registered proprietor of the said property. Clearly, the appellant does not in fact dispute that they are the immediate purchaser of the said property. The appellant's case is that the appellant is a bona fide purchaser for value without notice. In law, the evidential burden that the appellant was a bona fide purchaser for value without notice falls on the appellant. In the case of *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136; [2007] 4 CLJ 526 Raus Sharif JCA held that:

> Since the first defendant was relying on the proviso to s 340(3) of the NLC, that he was a bona fide purchaser for valuable consideration, the evidential burden falls on him. The evidential burden remained with the first defendant. There is no duty on the plaintiffs to prove that the first defendant was a party or privy to the fraud or forgery.

We would say on this point that, as a purchaser in a situation whereby constructive trust has been established and notwithstanding whether the purchaser is an immediate purchaser or a subsequent purchaser, the court will take into account relevant facts whether the appellant had conducted a proper investigation in the course of the transaction. The overriding consideration is the particular circumstances of each case.

[26] In *Au Meng Nam*, the appeal was against the dismissal of the appellants' claim against the first respondent, inter alia, for declaratory reliefs that they were the beneficial and legal owners of a piece of land which was transferred fraudulently to the first respondent. In the present case the appellant, just like the first respondent in the above case, was an immediate purchaser. It was held by this court as follows:

> The existence of a sale and purchase agreement and the payment of the purchase price in full should not be the only indicator to show whether a person was a bona fide purchaser or not. *Other salient features surrounding the sale and purchase agreement must be considered*. In the present case, the *first respondent acted hastily*.
>
> *He concluded the sale without any proper investigation* into the title or the persons claiming to be the proprietors. No doubt he had every right to take advantage of the low price that was offered to him but he took the risk. *When he took such a risk, it should not be at the expense of the appellants. That was because while he had a choice, the appellants had none. The appellants could not do anything to prevent fraud. In such circumstances the court must not favour the first respondent over the appellants*. Had the learned judge taken into account relevant facts and consideration surrounding the sale and purchase agreement, he would not have concluded that the first respondent was a bona fide purchase under s 340(3) of the NLC.
>
> A reasonable inference from the evidence adduced showed that the first defendant knew at the time he bought the land that the *purchase price was below the market value and that he had taken advantage of it by completing the purchase of the land hastily*. In doing so, the first respondent *disregarded his obligations to investigate* the alleged proprietors and the genuineness of the documents. *A purchaser in good faith does not include a purchaser who is careless or negligent*. Further, when the first respondent failed to take ordinary precautions that ought to be taken in a sale and purchase of a land, he was not entitled to the protection of the court. (Emphasis added.)

[27] In the present case it was not disputed that the following facts had been established which necessitated the appellant, claiming to be bona fide purchaser, to make a proper investigation:

(a) the recital of the sale and purchase agreement ('exh D13') had included the following term that the said property was sold to the deceased without vacant possession:

> AND WHEREAS the vendor is desirous of selling and the purchaser is desirous of buying the said properties on an *'as-is-where-is' basis at the price set out herein, without vacant possession* and subject to all whatsoever registered encumbrances thereon, and upon the terms and conditions herein contained.
>
> AND WHEREAS the *purchaser has inspected the said properties* and is satisfied or deemed to be satisfied with the location, condition and description thereof ...; (Emphasis added.)

(b) during cross-examination the director of the appellant namely DW2 admitted that he had notice of the occupiers on the said property;

(c) in cl 2 of the sale and purchase agreement it was expressly stated that the purchaser 'shall pay the full purchase price to the vendor upon execution of this agreement'. It is clear that the second respondent wanted to receive the full purchase price immediately;

(d) the transfer of the property was completed within three months from the date of the sale and purchase agreement despite the existence of the occupiers on the said property, a fact which shows that the transfer was effected hastily even though the issue of the occupier namely the first respondent was never settled;

(e) DW2 in his evidence was aware of the existence of the occupiers and the houses on the said property three weeks before executing the sale and purchase agreement but the appellant nevertheless proceeded to execute the sale and purchase agreement;

(f) DW1, who was the appellant's solicitor admitted that despite knowing that the term 'without vacant possession' was put in the sale and purchase agreement because there were houses and occupants on the said property he did not conduct any caveat search or property search with the relevant authorities despite being told to do so by the appellant;

(g) the appellant had even failed to tender any proof that an official land search was conducted prior to the transfer of the said property to the appellant, they instead produced through DW1 the land search dated 22 April 2014 which was after the sale and purchase agreement was entered on 22 January 2013; and

(h) the assessment bills issued by Majlis Bandaraya Johor Bahru ('exhs P5A–5R') were at all material times registered under the name of the deceased and subsequently the first respondent. DW2 agreed during cross-examination that if the search was done at Majlis Bandaraya Johor Bahru, it would reveal that the said property was registered under the name of the deceased and subsequently the first respondent.

[28] We would emphasise that, based on the above facts and the principle of law as discussed, the appellant had failed to discharge the evidential burden of proof to show that he was a bona fide purchaser without notice by their failure to conduct a proper investigation on the highly suspicious transaction involving the said property which was sold without vacant possession and occupied by the first respondent. In simple terms, the appellant had manifestly elected to disregard his obligations to investigate when faced with such a situation. We cannot accede to the argument urged for the appellant that the

requirements to do caveat and property searches at the city council and the Land Office at Johor Bahru would open the floodgates of other searches. What constituted a proper investigation in our opinion varies from case to case. If a purchaser bought a new property from a developer it would suffice if he were to conduct a land search. But if a purchaser, as with the appellant in the present case, bought a property in which the sale and purchase agreement clearly stated that the property was being sold without vacant possession and it could be seen that there were persons occupying it, then prudence would require that the purchaser to be a little bit more cautious and thorough searches must be conducted. The lawyer's ('DW1') evidence that a caveat search would not be necessary having taken into account the fact that no vacant possession was being given is nonsensical. The appellant could have anticipated the problems that he would be facing if he proceeded to enter into an agreement but elected not to bother.

[29] Based on the evidence, in particular the contemporaneous documents, we can discern no dispute that the consideration paid by the appellant to the second respondent for the purchase price was RM200,000 for the purchase of five lots, one of which is Lot 71 viz Lot 29661, HS(D) 302292, an average of RM40,000 per lot as evinced in the transfer form prescribed under the National Land Code ('exh P16'). The price paid by the appellant was definitely very much lower than the valuation made by the government. In fact to be specific, the actual value of Lot 71 itself assessed by the city council in the assessment bill dated 12 December 2014 was RM107,000 ('exh P9'). This is a relevant fact to consider where the issue of the status of the purchaser has arisen for determination. In fact the Court of Appeal in *Au Meng Nam*, said:

> The learned judge acknowledged the fact that the *consideration paid by the first respondent was below government valuation* and also the valuation done by the appellants' valuer. *However, he held that the fact could not negative the first respondent's status as bona fide purchaser since the appellants failed to adduce evidence of fraud or forgery. Clearly, the learned judge had misdirected himself on the law*. (Emphasis added.)

[30] In the Court of Appeal's case of *Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal* [2014] 1 MLJ 645; [2013] 9 CLJ 577, the appellant was the registered owner of a piece of land. Unknown to the appellant, one Ong Choon Teng ('the forger') purporting to act under a power of attorney had entered into a sale and purchase agreement with the third defendant and a new issue document of title was issued to the third defendant. A year later the fourth defendant agreed to purchase the land from the third defendant. The fourth defendant was then registered as the proprietor of the land. The issue was whether the third defendant was a bona fide purchaser for value and whether

A the fourth defendant was a bona fide purchaser for valuable consideration who had acquired an indefeasible title to the land by virtue of the proviso to s 340(3) of the National Land Code. The Court of Appeal held:

> The third defendant was not a bona fide purchaser for value based on the fact that the whole transaction from the forger to the third defendant was tainted with fraud. The third defendant could not have a good title which was obtained using voidable instruments. The third defendant had concluded the sale without any proper investigation into the title or the persons who are the actual proprietors. The third defendant was under an obligation to investigate properly all matters relating to the sale of the land. A negligent purchaser could not be accorded the protection of this court because a purchaser in good faith does not include a purchaser who has been negligent or who kept his eyes shut. Hence, when a purchaser failed to take ordinary precautions which ought to have be taken in such a matter, he is not entitled to the protection of the court.

[31] The Court of Appeal in the above case (*Yap Ham Seow*) referred to the decision of *Au Meng Nam*, wherein Raus Shariff PCA (at p 678 (MLJ); p 620 (CLJ)) said:

> The case of *Au Meng Nam* reiterated the governing principles as propounded by Lindley MR in *Oliver v Hinton* [1899] 2 Ch 264. The Chancery Court in *Oliver v Hinton* found the purchaser to be grossly negligent in failing to make inquiries as to the title and relied on his agent completely. The Chancery Court through Lindley MR held that:
>
> In the present case there has been no fraud on the part of the defendant; there has only been gross negligence in the ordinary sense of words.
>
> ... negligence so gross as would justify the Court of Chancery in concluding that there had been fraud in an artificial sense of the word-such gross negligence, for instance as omitting to make any inquiry as to the title of the property. In that sense of the word, I think, there has been in the present case on the part of the defendant negligence so gross as would have led the Court of Chancery to impute fraud of that kind to her. I do not mean to suggest that there was any fraud in fact.

[32] It is an irrefutable fact that in the present case the appellant did not even bother to conduct the searches including land search in view of the presence of the occupiers on the said land prior to entering into the sale and purchase agreement dated 22 January 2013. The appellant had totally relied on their solicitor ('DW1') and DW1 had obviously failed to conduct the relevant searches on the said property. In fact DW1 admitted that he did not conduct any caveat search on the said property. The failure of the appellant's solicitor to conduct relevant searches to determine the status of the property was discussed in the Court of Appeal's case of *State Tailor Sdn Bhd v Nallapan* [2005] 2 MLJ 589, Richard Malanjum JCA in his decision stated:

> Of course she could argue that she left the matter with her lawyer to deal. But her lawyer was her agent. And the general rule is that the knowledge of a solicitor is the knowledge of his client thereby depriving a client of the plea of lack or absence of

knowledge due to the failure of his solicitor to disclose the true facts to him.

[33] In the present case the appellant was not a subsequent purchaser. Rather, the appellant was an immediate purchaser whose rights had been explained in the Federal Court case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269 in the following terms:

> Sub-section (3) of s 340 of the NLC merely provided that any title or interest which was defeasible by any of the circumstances specified in sub-s (2) shall continue to be liable to be set aside in the hands of a subsequent holder of such title or interest. That subsection was subject to the following proviso which read 'Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser'. The proviso was directed towards the provision of sub-s (3), supported by the use of the words 'in this subsection' found therein. The application of the proviso could not be projected into the sphere or ambit of any other provisions of s 340.
>
> Although sub-s (3) of s 340 of the NLC made reference to sub-s (2), sub-s (3) was restricted to subsequent transfers or interests in the land
>
> In the present case, the charge instruments were indisputably forged instruments. It followed that the two charges were liable to be set aside under s 340(2)(b) of the NLC. The third respondent was the immediate holder of those charges. It could not take advantage of the proviso to s 340(3) ...
>
> The fact that the third respondent acquired the interest in good faith for value was not an issue. Once it was satisfied that the charges arose from void instruments, it automatically followed that they were liable to be set aside at the instance of the registered proprietor, namely the appellant.

[34] In the Federal Court case of *Samuel Naik Siang Ting*, it was held:

> There was no merit in the appellant's argument that he was a bona fide purchaser for valuable consideration and therefore by virtue of the proviso to s 340(3) of the NLC his title to the land was indefeasible. In the present case, the relevant form 14A in respect of the transfer of the title to the appellant was a void instrument and therefore the appellant's title and interest in the lot was indisputably defeasible. The appellant was an immediate purchaser of the lot in question from its registered proprietor, MPM. That being the case, the appellant clearly could not enjoy the benefit of the proviso to sub-s (3). As such, once the transfer of the title to the appellant arose from a void instrument, it was liable to be set aside.

[35] The second respondent was a bare or constructive trustee when they attempted to pass or transfer the said property to the appellant. They had no title to the said property. The position of law can be discerned from the Federal Court's decision in the case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768 wherein Jeffrey Tan FCJ in his decision at p 779 referred to another Federal Court case of *M & J Frozen Food Sdn Bhd &*

Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294:

> Wan Yahya SCJ ruled that an immediate purchaser only acquires a defeasible title or interest: Indefeasibility can be rebutted not only in instances of fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired.
>
> A purchaser of land might fail to obtain a good title in two distinct ways. Firstly, if the title of the vendor is bad. Secondly, even if the vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title. These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule is that no person can give a better title than he had — *nemo dat quod non habet.*

At p 797, Jeffrey Tan FCJ went on to say:

> An immediate purchaser of a title tainted by any one of the vitiating elements acquires a title that is not indefeasible. It flows from *Tan Ying Hong* that the bona fides of an immediate purchaser is not a shield to defeasibility. The defeasible title of a bona fide immediate purchaser is still liable to be set aside.

[36] In the present appeal, the appellant's title is tainted by one of the vitiating elements. It flows from the fact that the title of the second respondent is bad. They held the said property on constructive trust as a constructive or bare trustee. The learned judge had made findings of fact on this issue in para 6.5 of the grounds of judgment. The learned judge stated:

(a) before the execution of the sale and purchase agreement, the second defendant/appellant or its representatives knew that there were occupants on the lands which they were to purchase;

(b) the second defendant/appellant even knew that there were buildings and residents and had met up with them;

(c) the land search tendered by the respondent revealed that a caveat was lodged in 2015;

(d) no caveat search was done at the land office and no property search was done at Majlis Bandaraya Johor Bahru;

(e) the market value of this subject property is below that assessed by Majlis Bandaraya Johor Bahru;

(f) the sale and purchase agreement was signed without the vacant possession;

(g) the purchase was completed within three months of the execution of the sale and purchase agreement; and

(h) SD1 told the court that he had done a land search which shows that the land was free from encumbrances but he did not tender the land search to support his claim.

From the evidence adduced, I am of the considered view that when a purchaser purchases a piece of land from a seller on 'as is where is' basis with the knowledge that there were occupants on the land, the test is whether he has a duty to carry out the proper investigation or make further enquiries to ensure that the land is free from encumbrances. What is proper investigation or further enquiries would depend on the facts of each case. What SD1 did in this case was that he claimed that he only did the land search but did not tender the document to support his claim and he did not do the caveat search as he said it was not necessary. He also did not do the property search as instructed by SD2.

From the facts adduced the test is: what are the basic steps which a reasonable buyer ought to have taken under the circumstances of the case? I am of the considered view that the second defendant vide SD1 has not done enough to avail himself of the defence of bona fide purchaser for value without notice for the following reasons:

First, to avail himself of the defence of bona fide purchaser for value with the facts that he bought a piece of land with the knowledge that they were occupants on it, the second defendant vide SD1 must at the very least have carried out the following steps:

(a) he must do the land search and if the land search reveals that there was a caveat lodged, then he must carry out the caveat search to find out the interest of the caveator; and

(b) the land search shows the existence of a private caveat which had expired, it is then not necessary to do the caveat search.

For the above reasons, I find that the second defendant has failed to satisfy the court he was a bona fide purchaser for value without notice. Therefore the equity should assist the plaintiff, the victim of the breach of trust to trace the subject property from the second defendant who was not a bona fide purchaser for value without notice.

These are unassailable findings of fact which we have no reason to differ. We are therefore left with more than a clear feeling that there should be no reason to hold that the sale and transfer of the said property by the second respondent to the appellant was valid. The vendor namely the second respondent had no title to pass. They could not give what they did not have, *nemo dat quod non habet* (*Au Meng Nam & Anor*). The only exception is in favour of a bona fide purchaser for value without notice, however the evidence pointed against the appellant on this issue.

CONCLUSION

[37] On critical examination of the whole of the evidence and for the reasons discussed which are supported by a plethora of cases on the points raised, there is not the slightest room for doubt that the learned judge was correct in fact and in law in arriving at his decision based on the totality of evidence and especially on the undisputed facts. There is no error on the part of the learned judge in allowing the claim of the first respondent. The appellant had failed to realise that they had purchased the said property as an immediate purchaser with the

unfortunate result that when they became a registered proprietor, it had been proven that they were not a bona fide purchaser and thus their title is not indefeasible but one that could legally be set aside. The second respondent who sold the said property to the deceased before deciding to sell again to the appellant in this case had abandoned their defence after the first respondent's case. The second respondent as rightly decided by the learned judge, had committed a breach of trust and fraud by transferring the property to the appellant. It was not disputed that the second respondent had received the full purchase price from the deceased and had surrendered vacant possession of the said property to the deceased. The second respondent was thus merely a constructive or bare trustee, that is, a person without beneficial interest in the said property. Being as such, the second respondent was not permitted in law to sell or transfer the said property to the appellant.

[38] As a general rule, appellate interference is only in rare cases (*Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567). It is a settled principle of law that in an appeal where facts have to be reviewed, it is undesirable that the factual findings of the court of first instance be disturbed by this court unless it appears that those findings are clearly wrong, or suffer from some serious errors or are against the weight of evidence (*China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163). In our judgment, having reviewed the learned judge's decision and the grounds thereof, we are satisfied that the learned judge had sufficiently appreciated and meticulously reviewed the evidence and did not misapprehend the law when His Lordship arrived at the conclusion as he did in allowing the respondent's claim. The uncomfortable and inexorable truth that the appellant has to face is that they did not obtain an indefeasible title when they purchased the said property.

[39] We made the above findings as it is now obvious that the learned judge came to a correct finding of fact and law. This case is patently one where appellate interference is not warranted. There is thus no valid justification for this court to disturb His Lordship's decision given the reasons we alluded to above. In the premises and for the reasons discussed, we are consequently driven inevitably to the conclusion that there are no merits in this appeal. Therefore, we affirm the decision of the learned judge in allowing the first respondent's claim and dismissing the appellant's counterclaim. The appeal is dismissed with costs of RM20,000 to be paid by the appellant to the first respondent subject to payment of allocatur fee. The deposit shall be refunded to the appellant.

Appeal and counterclaim dismissed and the High Court's decision affirmed.

Reported by Ashok Kumar